MOTION GRANTED

For the Panel

April 20, 2016

William Greenberg
Judge

IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

RICARTE A. SOLIBEN,	)	
	)	
Appellant,	)	
	)	
v.	)	
	)	Vet.App. No. 14-3240
ROBERT A. MCDONALD,	)	
Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	
	)	

UNOPPOSED MOTION FOR LEAVE TO FILE EXCERPTS FROM THE RECORD BEFORE THE AGENCY

Appellant Ricarte A. Soliben hereby moves the Court, pursuant to Rules 10 and 27, for leave to file excerpts from the record before the agency (attached as "Exhibit A"). Good cause exists for granting this motion; the excerpts correspond to Mr. Soliben's brief in support of equitable tolling, and will assist the Court in reviewing the parties' briefs in advance of oral argument on May 11, 2016.

Counsel for Mr. Soliben conferred with counsel for the Secretary on April 15, 2016. The Secretary is unopposed to this Motion.

CONCLUSION

In light of the foregoing, Mr. Soliben moves for leave to file the attached excerpts from the record before the agency.

Respectfully submitted this 18th day of April, 2016.

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Counsel for Ricarte A. Soliben, Appellant

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the United States of America that on April 18th, 2016, a true and correct copy of the foregoing **UNOPPOSED MOTION FOR LEAVE TO FILE EXCERPTS FROM THE RECORD BEFORE THE AGENCY** was served via CM/ECF to:

Kristen D. King-Holland
Office of the General Counsel (027G)
Department of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, D.C. 20420

/s/ Rebecca A. Golz

EXHIBIT A

Excerpts from the Record Before the Agency

INTRODUCTION

The Veteran, who is the appellant, served on active duty from May 1993 to November 1993, from November 1997 to April 2003, and from August 2003 to November 2006.

This matter comes to the Board of Veterans' Appeals (Board) on appeal from an October 2007 rating decision by the Department of Veterans Affairs (VA) Regional Office (RO) in Atlanta, Georgia.

The Veteran testified at a May 2011 Central Office hearing before the Veterans Law Judge A. Bryant. A complete transcript of the hearing is of record. This Veterans Law Judge has since retired. In January 2014, the Board sent the Veteran a letter informing him that the Veterans Law Judge who presided at his hearing is no longer with the Board and asking him if he wished to attend another hearing before a Veterans Law Judge who would render a determination in his case. That letter was returned as undeliverable, so the Board identified a better address for the Veteran, and remailed this letter in April 2014. This letter was not returned, and the Veteran did not indicate that he wished to appear at an additional Board hearing within the time allotted. Therefore, the Board will proceed to evaluate the appeal. *See* 38 U.S.C.A. §§ 7102, 7107(c) (West 2002); 38 C.F.R. § 20.707 (2013).

In September 2011, the Board remanded the Veteran's increased rating claim to the RO for additional development, including obtaining updated treatment records and scheduling the Veteran for orthopedic and neurological examinations. In March 2012, after the RO substantially completed this additional development, it increased the Veteran's disability rating for the service-connected back disability to 60 percent, effective November 18, 2011.

In an April 2012 correspondence with the VA, the Veteran agreed with the RO's decision increasing his rating to 60 percent, but expressed intent to have that rating carry through his original claim date. Accordingly, the Board framed this issue as

With any form of arthritis, painful motion is an important factor of disability, the facial expression, wincing, etc., on pressure or manipulation, should be carefully noted and definitely related to the affected joints. The intent of the rating schedule is to recognize painful motion with joint or periarticular pathology as productive of disability. It is the intention to recognize actually painful, unstable, or malaligned joints, due to healed injury, as entitled to at least the minimum compensable rating for the joint. Crepitation either in the soft tissues such as the tendons or ligaments, or crepitation within the joint structures should be noted carefully as points of contact which are diseased. Flexion elicits such manifestations. 38 C.F.R. § 4.59.

Analysis of Increased Initial Rating for Back Disability

The Veteran injured his back during a tour of duty in Iraq. He reported feeling back pain after his unit put sheet metal around his body armor. After complaints of chronic back pain and limited movement stemming from the incident, the Veteran underwent an MRI of his lumbar spine in mid-December 2005. The MRI revealed degenerative disc disease at the L4-L5 and L5-S1, but greater at the lower level where the narrowing of the sac and moderate narrowing of the bilateral neural foramina and compression on the exiting nerve roots was observed. Although the Veteran attempted a series of conservative measures including pain medications and a course of physical therapy, none of these methods relieved his symptoms. The Veteran's neurologist opted for surgical intervention. To this end, the Veteran underwent a right hemilaminectomy and disccectomy of the L5-S1 in March 2006. Since the surgical procedure, the Veteran continued to complain of significant low back pain. In August 2006, the Veteran received approval for a medical discharge from the military due to residual back pain post surgery. Upon application, the RO granted the Veteran service connection for a back disability in the October 2007 rating decision that is the subject of this appeal. An initial 10 percent disability rating was assigned under the provisions of 38 C.F.R. § 4.71a, effective November 24, 2006. The Veteran contends that his back disability warranted a higher initial rating.

Ricarte Allen Soliben
517 W. Black Oak Road
Nixa, MO 65714

July 28, 2014

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED
#7013 3020 0000 9713 1005
Board of Veterans' Appeal
Department of Veterans Affairs
810 Vermont Ave., NW
Washington, D.C. 20420

Re: Name of Veteran: Ricarte Allen Soliben
SSN: [redacted]

Dear Sir or Madame:

I am respectfully requesting a complete copy of the decision made by the Board of Veterans' Appeal regarding my claim for benefits. This information has never been provided to me and I need this information to proceed with my claim.

Thank you for your attention to this matter. If this office can be of any further assistance, please do not hesitate to contact me.

Yours very truly,

Ricarte Allen Soliben

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OMB Approved No. 2900-0075
Respondent Burden: 15 minutes

Department of Veterans Affairs

STATEMENT IN SUPPORT OF CLAIM

PRIVACY ACT INFORMATION: The VA will not disclose information collected on this form to any source other than what has been authorized under the Privacy Act of 1974 or Title 38, Code of Federal Regulations 1.576 for routine uses (i.e., civil or criminal law enforcement, congressional communications, epidemiological or research studies, the collection of money owed to the United States, litigation in which the United States is a party or has an interest, the administration of VA Programs and delivery of VA benefits, verification of identity and status, and personnel administration) as identified in the VA system of records, 58VA21/22, Compensation, Pension, Education and Rehabilitation Records - VA, published in the Federal Register. Your obligation to respond is required to obtain or retain benefits. VA uses your SSN to identify your claim file. Providing your SSN will help ensure that your records are properly associated with your claim file. Giving us your SSN account information is voluntary. Refusal to provide your SSN by itself will not result in the denial of benefits. The VA will not deny an individual benefits for refusing to provide his or her SSN unless the disclosure of the SSN is required by Federal Statute of law in effect prior to January 1, 1975, and still in effect. The requested information is considered relevant and necessary to determine maximum benefits under the law. The responses you submit are considered confidential (38 U.S.C. 5701). Information submitted is subject to verification through computer matching programs with other agencies.

RESPONDENT BURDEN: We need this information to obtain evidence in support of your claim for benefits (38 U.S.C. 501(a) and (b)). Title 38, United States Code, allows us to ask for this information. We estimate that you will need an average of 15 minutes to review the instructions, find the information, and complete this form. VA cannot conduct or sponsor a collection of information unless a valid OMB control number is displayed. You are not required to respond to a collection of information if this number is not displayed. Valid OMB control numbers can be located on the OMB Internet Page at www.whitehouse.gov/omb/library/OMBINV.html#VA. If desired, you can call 1-800-827-1000 to get information on where to send comments or suggestions about this form.

FIRST NAME - MIDDLE NAME - LAST NAME OF VETERAN *(Type or print)*	SOCIAL SECURITY NO.	VA FILE NO.
Ricarte Allen Soliben	[redacted]	C/CSS - XXX-XX-6381

The following statement is made in connection with a claim for benefits in the case of the above-named veteran:

I am agreeing with your decision for two reasons.
First, I have been on Morphine and Oxycodone for many years and Im not getting better. The doctors say I need another operation. The pain I live with from the time I wake up to the time I go to sleep is so overwhelming. In the morning I have to take my meds before I can even move. It hard to even play with my children. I don't like driving with my family because of the pain pills. This is not meant to be a sympathy session but a small background on my everyday life.
As for employment. The only skill I have are what I have learned in the Army or using my back. Either Im limited because of the pain or I can't pass a drug test.
Since I was injured in Iraq (2005) I have only gotten worse. To ~~now~~ only rate my back a 60% with $0.00 backpay from Nov 2006. is a shame. Im not asking for anything I have not earned.

Secondly. How is it possible to recieve Ø backpay.

I CERTIFY THAT the statements on this form are true and correct to the best of my knowledge and belief.

SIGNATURE	DATE SIGNED
[signature]	27 April 2012

ADDRESS	TELEPHONE NUMBERS *(Include Area Code)*	
	DAYTIME	EVENING
116 Grandview dr. (Address Change) Hinesville, Ga. 31313	[redacted]	Same

PENALTY: The law provides severe penalties which include fine or imprisonment, or both, for the willful submission of any statement or evidence of a material fact, knowing it to be false.

VA FORM AUG 2004 **21-4138** EXISTING STOCKS OF VA FORM 21-4138, JUN 2000, WILL BE USED CONTINUE ON REVERSE

Diagnosis #1: Intervertebral disc disorders , s/p laminectomy L5-S1
ICD code: 722.90
Date of diagnosis: 2005

Diagnosis #2:
ICD code:
Date of diagnosis:

Diagnosis #3:
ICD code:
Date of diagnosis:

If there are additional diagnoses pertaining to thoracolumbar spine (back) conditions, list using above format:

2. Medical history

Describe the history (including onset and course) of the Veteran's thoracolumbar spine (back) condition (brief summary):
3/2006 surgery partial right laminectomy,
Iraq deployment, in vehicles when IED detonated x6, wearing heavy gear when force of blast hit back.
Current: requires morphine and oxycodone to function at lower level of pain. Without meds "useless". Pain is worse than 10 lower back into shoulders, vice-like with tightening symptoms. With meds pain 7/10, continued vice-like and pressure but allows movement.

3. Flare-ups

Does the Veteran report that flare-ups impact the function of the thoracolumbar spine (back)? [X] Yes [ ] No

If yes, document the Veteran's description of the impact of flare-ups in his or her own words:
without meds, back flares,

4. Initial range of motion (ROM) measurements

Measure ROM with a goniometer, rounding each measurement to the nearest 5 degrees. During the measurements, observe the point at which painful motion begins, evidenced by visible behavior such as facial expression, wincing, etc. Report initial measurements below.

Following the initial assessment of ROM, perform repetitive-use testing. For VA purposes, repetitive-use testing must be included in all exams. The VA has determined that 3 repetitions of ROM (at minimum) can serve as a representative test of the effect of repetitive use. After the initial measurement, reassess ROM after 3 repetitions. Report post-test measurements in section 5.

a. Select where forward flexion ends (normal endpoint is 90):
[ ] 0 [ ] 5 [ ] 10 [ ] 15 [ ] 20 [ ] 25 [ ] 30
[ ] 35 [ ] 40 [ ] 45 [ ] 50 [ ] 55 [ ] 60 [ ] 65
[ ] 70 [ ] 75 [ ] 80 [ ] 85 [X] 90 or greater

Select where objective evidence of painful motion begins:
[X] No objective evidence of painful motion
[ ] 0 [ ] 5 [ ] 10 [ ] 15 [ ] 20 [ ] 25 [ ] 30
[ ] 35 [ ] 40 [ ] 45 [ ] 50 [ ] 55 [ ] 60 [ ] 65
[ ] 70 [ ] 75 [ ] 80 [ ] 85 [ ] 90 or greater

b. Select where extension ends (normal endpoint is 30):
[ ] 0 [ ] 5 [ ] 10 [ ] 15 [ ] 20 [ ] 25 [X] 30 or greater

Select where objective evidence of painful motion begins:
[X] No objective evidence of painful motion
[ ] 0 [ ] 5 [ ] 10 [ ] 15 [ ] 20 [ ] 25 [ ] 30 or greater

c. Select where right lateral flexion ends (normal endpoint is 30):
[ ] 0 [ ] 5 [ ] 10 [ ] 15 [ ] 20 [ ] 25 [X] 30 or greater

Does the Veteran have radicular pain or any other signs or symptoms due to radiculopathy? [ ] Yes [X] No

If yes, complete the following section:

a. Indicate symptoms' location and severity (check all that apply):

Constant pain (may be excruciating at times)
Right lower extremity: [ ] None [ ] Mild [ ] Moderate [ ] Severe
Left lower extremity: [ ] None [ ] Mild [ ] Moderate [ ] Severe

Intermittent pain (usually dull)
Right lower extremity: [ ] None [ ] Mild [ ] Moderate [ ] Severe
Left lower extremity: [ ] None [ ] Mild [ ] Moderate [ ] Severe

Paresthesias and/or dysesthesias
Right lower extremity: [ ] None [ ] Mild [ ] Moderate [ ] Severe
Left lower extremity: [ ] None [ ] Mild [ ] Moderate [ ] Severe

Numbness
Right lower extremity: [ ] None [ ] Mild [ ] Moderate [ ] Severe
Left lower extremity: [ ] None [ ] Mild [ ] Moderate [ ] Severe

b. Does the Veteran have any other signs or symptoms of radiculopathy?
[ ] Yes [X] No

If yes, describe:

c. Indicate nerve roots involved: (check all that apply)

[ ] Involvement of L2/L3L/L4 nerve roots (femoral nerve)

If checked, indicate: [ ] Right [ ] Left [ ] Both

[ ] Involvement of L4/L5/S1/S2/S3 nerve roots (sciatic nerve)

If checked, indicate: [ ] Right [ ] Left [ ] Both

[ ] Other nerves (specify nerve and side(s) affected):

d. Indicate severity of radiculopathy and side affected:
Right: [ ] Not affected [ ] Mild [ ] Moderate [ ] Severe
Left: [ ] Not affected [ ] Mild [ ] Moderate [ ] Severe

13. Other neurologic abnormalities

Does the Veteran have any other neurologic abnormalities or findings related to a thoracolumbar spine (back) condition (such as bowel or bladder problems/pathologic reflexes)?
[ ] Yes [X] No

If yes, describe condition and how it is related:

If there are neurological abnormalities other than radiculopathy, also complete appropriate Questionnaire for each condition identified.

14. Intervertebral disc syndrome (IVDS) and incapacitating episodes

a. Does the Veteran have IVDS of the thoracolumbar spine?
[X] Yes [ ] No

b. If yes, has the Veteran had any incapacitating episodes over the past 12 months due to IVDS? [X] Yes [ ] No

NOTE: For VA purposes, an incapacitating episode is a period of acute symptoms severe enough to require prescribed bed rest and treatment by a physician.

If yes, provide the total duration of all incapacitating episodes over the past 12 months:
[ ] Less than 1 week

- Report from VA exam from 8-7-09, conducted at the VAMC in Dublin, Georgia.

REASONS FOR DECISION

Service connection for post-traumatic stress disorder (PTSD).
We may grant service connection for a disease or disability that began in military service or was caused by some event or experience in service. A disability that began in service or was caused by some event in service must be considered "chronic" before service connection can be granted. In order to establish a claim post-traumatic stress disorder, the following is needed: medical evidence diagnosing the condition in accordance with the fourth edition of the Diagnostic and Statistical Manual of Mental Disorders; credible supporting evidence that the claimed inservice stressor occurred; and a link, established by the medical evidence, between the current symptoms and the inservice stressor. Please note that if the evidence establishes that you engaged in actual combat with the enemy, such as an award of Combat Action Ribbon or prisoner-of-war status, and your claimed inservice stressor is related to that combat, your lay testimony alone may establish the occurrence of the inservice stressor.

Review of your DD Form 214 shows that you served in the Army on active duty from 8-27-03 to 11-23-06 as a small arms artillery rep and you served in Iraq from 1-17-05 to 12-22-05. You received a combat action badge, denoting your individual participation in combat with the enemy.

Treatment reports from the VAMC in Charleston, South Carolina and the VA OPC in Savannah, Georgia noted you were evaluated based on your history of exposure to multiple IED blasts in service. You reported adjustment issues with depression and anxiety and sleep disturbance. On report from 1-3-07, you reported being married for 4 and 1/2 years. You reported mild concentration and fatigue problems, moderate sleep difficulties and anxiety, and mild sadness and moderate irritability. You reported avoiding crowded places. Mental status exam showed normal speech, somewhat depressed mood, congruent affect, no suicidal or homicidal ideation, linear thought, good insight and judgment and normal memory. Assessment was adjustment disorder with anxious and depressed mood with sleep disturbance. You reported medicating with alcohol. You indicated you did not want treatment or evaluation in the mental health clinic. No further treatment was noted for those symptoms.

At the VA exam of 8-7-09, you reported you were in the process of divorcing your fourth wife, but you were close to your child. You reported poor family life growing up, noting that you were put in a foster home by your mother until you were 5 or 6, when she retrieved you and your brother. You reported that she abused you and your brother along with her many spouses, until you left the house before your senior year, to live with a friend. You reported you were constantly trying to protect her from all possible threats or harm. You reported you were unable to trust people. You denied suicidal ideation. You reported anger outbursts and poor sleep due to memories of combat and nightmares.

You indicated you were now working in Iraq as a contractor in a similar job to the one you held in service. Mental status exam showed your hygiene was good and you were oriented times three. You had constricted affect with good mood, intact attention, linear and logical thoughts, partial insight and fair impulse control. Your memory was good and your judgment was fair. You did report some homicidal thoughts. Examiner diagnosed you with post-traumatic stress disorder (PTSD) and indicated that your early life set you up for this outcome, but she believed that had you not been in the military and involved in combat, there is a greater than 50 percent chance that you would not have developed PTSD. She assigned a global assessment of functioning score of 60, denoting mild to moderate impairment of social and occupational functioning.

We are granting service connection for post-traumatic stress disorder (PTSD) as the evidence shows diagnosis of this disability, we have evidence you were involved in combat, and we have evidence at the VA exam of 8-7-09, indicating your PTSD is likely related to your in-service experiences. Service connection for post-traumatic stress disorder (PTSD) has been established as directly related to military service.

We are assigning a 50 percent evaluation based on symptoms of constricted affect with history of depression, irritability, impaired impulse control, inability to trust people, poor sleep due to nightmares and memories, hypervigilance, and some thoughts of hurting others, without delusions, suicidal ideation, memory loss, or attention deficit. An evaluation of 50 percent is assigned from August 7, 2009. An evaluation of 50 percent is assigned for occupational and social impairment with reduced reliability and productivity due to such symptoms as: flattened affect; circumstantial, circumlocutory, or stereotyped speech; panic attacks more than once a week; difficulty in understanding complex commands; impairment of short- and long-term memory (e.g., retention of only highly learned material, forgetting to complete tasks); impaired judgment; impaired abstract thinking; disturbances of motivation and mood; difficulty in establishing and maintaining effective work and social relationships. Those symptoms are most nearly indicative of moderate impairment of social and occupational functioning.

A higher evaluation of 70 percent is not warranted unless there are deficiencies in most areas, such as work, school, family relations, judgment, thinking, or mood, due to such symptoms as: suicidal ideation; obsessional rituals which interfere with routine activities; speech intermittently illogical, obscure, or irrelevant; near-continuous panic or depression affecting the ability to function independently, appropriately and effectively; impaired impulse control (such as unprovoked irritability with periods of violence); spatial disorientation; neglect of personal appearance and hygiene; difficulty in adapting to stressful circumstances (including work or a worklike setting); inability to establish and maintain effective relationships. While we note that you report some history of thoughts of hurting others, there is no evidence of plan and review of the rest of your symptoms shows moderate impairment of social and occupational functioning.